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De wisseling van het opperbevel in februari 1940 getoetst aan de praktijk van de Oorlogswet in de periode 1887-1940

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Summary

Before 1887 existed in Holland a codification of the emergency law which was of French origin and which went back to 1791 and 1811 respectively. By including article 187 in the Constitution of 1887, the possibility was created to announce the state of war or state of martial law by or on behalf of the King in order to maintain the national security of the country. This law would deal with both the ways and situations in which this was to be effected. This was realized in 1899 by the establishment of the War Law.

This organic law had come a long way. Amongst other causes, this was due to various cabinet changes and the concomitant ministerial changes in the War Department. Furthermore, in the period at issue defence matters did not receive high priority on the shortlist of the government. Also of influence was the fact that the government, in drafting the War Law, had the intention to pass maximum authority from civil to military authorities during the state of war or state of martial law. The Parliament was sceptical, for fear of being degraded to a nominal figure in the event of extraordinary statutory conditions. The main cause of the slow legislative proceedings however was that the government was inexperienced with codification of the emergency law. The central issue was which situations were to be governed by the law and in which way this was to be effected. Moreover, it was - and still is - inherent to crises that it is impossible to foresee all events. It is therefore not possible to include all eventualities that may occur during emergency situations in legislation. This is why - next to a codified emergency law which is also called objective emergency law - there has to be a provision for applying emergency law in matters which are not dealt with by the emergency law, the so-called subjective emergency law. This is to be adopted even when it would go against legislation which was designed for ordinary situations. The legislative authorities were confronted with this complex constitutional issue during the emergence of the War Law.

There was a consensus between the legislative and executive bodies concerning the necessity of a national codification of the emergency law. This was a result of the character of modern warfare which aimed at a sudden start and quick settlement. Furthermore, the battle field of such wars was vast, which created the need to proclaim extraordinary wartime legislation over larger regions of territory rather than just fortresses and fortified cities alone. The old French legislation did no longer provide for the new demands in warfare, and was due for revision.

Application of the War Law from the mobilization onwards during World War I showed its various shortcomings. Especially the lack of delegative powers and the issue of legislative powers of the military authorities. With respect to the delegative powers, the decree of the Supreme Court of 1916 stated that these were not covered by legislation. For that reason, the Supreme Court did not acknowledge these powers of the military authorities. With respect to the legislative powers, another decree of the Supreme Court in the same year stipulated that, in a state of war, orders issued by the civil authorities were to remain effective next to those of the military authorities. Because of these decrees, the War Law was interpreted in a formalistic manner by the Supreme Court, whereas the military authorities were inclined to interpret - and use - it as a general guideline which included a framework in order to deal with crisis situations adequately.

The military authorities were hindered in their task by the decrees of the Supreme Court. For that reason, the government tried to eliminate any gaps or obscurities in the

War Law during the mobilization and relied on experience. This initiative did not result in the revision needed, since the draft of the law did not reach the final phase in Parliament. The procedure was postponed until May 6 1929 when the government requested the Chamber to return the draft. The main reason seems to be that Holland had become tired of the mobilization and allergic to anything that bore a relationship with war. Although understandable, it was an attitude of irresponsibility.

Proclaiming the state of war or state of martial law in state-owned areas since the start of the mobilization in 1914, was quite common contrary to historic literature. When war continued across the border, the War Law served especially as a remedy for counteracting smugglers. In practice, application of the War Law did not lead to any serious difficulty between the military authorities and the civil authorities, barring exceptions. This is apparent from reports of the military authorities.

Like the announcement of the state of war or state of martial law since the beginning of the mobilization in 1914, the discontinuance of this exceptional situation, depending on the conditions in the locations concerned, took place in phases. It turned out that civil authorities, belonging to the Departments of Justice and Finance amongst others, could not dispense with the assistance of the military authorities in most cases. This was especially the case in border regions in order to deal with smugglers and control the passing of aliens. Even during the mobilization, civil authorities insisted on continuance of the state of martial law because they were unable to deal with these matters adequately themselves. This is also apparent from the reports by the military authorities. It appears from these that the military authorities, contrary to what complaints from the Dutch Lower Chamber suggest, did not intend to take over tasks such as police and customs services from the civil authorities. The opinion that the state of war or state of martial law meant nothing but distress for the civilian population and the civilian magistrates, is not correct. The War Law was applied during the period between August 27 1914 and April 16 1920.

During the interbellum period, a revision of the War Law did not take place. In view of the experiences during the mobilization, it was a serious deficiency that such revision was not taken care of by the consecutive governments, since a revision of the law during that period would not have met with any opposition.

In the main, three phases can be distinguished. The first phase concerns the period during which warfare as a means to resolve political conflicts was declined. This period is characterized by a relative stability in international relationships from which Holland - as a new member of the League of Nations - took benefit. There was a favourable climate for revision of the War Law. This period lasted approximately until the early Thirties. The second phase comprised the years following the beginning of the economic recession until 1935 approximately, in which year Hitler announced the German rearmament. Following the emergence of radical left-wing and right-wing movements, these years are characterized by measures of the central authorities to maintain the peace and quiet in the nation. In that period, the government could also have adapted the War Law to modern standards. The third phase comprises the years following the German rearmament with international strains increasing, in which it became clear that Holland could not remain neutral in a future war. If there ever was any need for alterations to the War Law, then it must have been during this phase.

In none of these periods did the consecutive governments show any initiative to revise the dated War Law in order to be able to mobilize the country in a modern manner constitutionally. There was a military draft of law in 1938, named after the advisers G.J. Sas and C.J.F. Caljé. This draft however was not adopted by the government as a

guideline for a revised War Law. Typical of this draft, in conformity with the opinion in military circles concerning strategic attacks, no mention was made of the state of war as a transitional phase towards a state of martial law. This emerged from general practice that modern warfare would not be preceded by a declaration of war. Furthermore, it is typical that this draft - again - bestowed maximum powers on the military authorities, to give them the opportunity to effect their tasks to the best of their abilities. The opinion of Sas and Caljé differed therefore from the decrees of the Supreme Court of 1916, but was in agreement with the opinion ventilated in a book of the Ministry of Defence in that same period which was titled 'Handleiding voor de uitoefening van het Militair Gezag' (i.e. Guidelines for the execution of Military Authority).

A new War Law, based on the cooperation between two elements in a modern war, viz. military effort and civilian defence, would have been the ideal solution. In modern warfare, the entire population was involved and there was no longer any distinction between combatants and non-combatants. It was natural therefore that civil bodies, amongst others for their expertise in certain areas, should also have been granted powers in order to be able to assist in national defence matters. This was not possible because of mutual distrust between both elements in society.

In August 1939, it was again necessary for Holland to mobilize its armed forces. The state of war was proclaimed on the basis of the dated War Law, however with only a few articles in force and therefore not applied in full. This came into being after a compromise between the government and the commander-in-chief, who is also head of the military authorities, a so-called 'gentlemen's agreement'. This compromise is evidence to the fact that Holland was not prepared for an effective constitutional mobilization in 1938. As a result, the De Geer government, installed in August 1939, was not capable or prepared to endow the military authorities with sufficient powers.

The commander-in-chief, General I.H. Reynders, was reluctant to accept this agreement and expected that the Minister of Defence, A.Q.H. Dijkhoorn, his former subordinate, would succeed in persuading the government to proclaim the state of martial law in the entire country. His hope was enhanced by the fact that the Minister himself, being a professional serviceman, was in favour of proclaiming the state of martial law and had promised the commander-in-chief to do his utmost to have this extraordinary legal situation proclaimed. The expectations of the commander-in-chief however were not fulfilled. The Minister of Defence proved incapable of persuading his colleagues to proclaim the state of martial law. It is more appropriate to state that the Minister was politically inexperienced and was no match for his colleagues. It took until November 1939 before some regions were proclaimed in a state of martial law.

Contrary to the period of mobilization during World War I, when cooperation between the Minister of War, N. Bosboom, and the commander-in-chief, General C.J. Snijders, had been good - a cooperation which came to an end in 1917 when Minister Bosboom resigned - General Reynders did not receive the support from the Minister of Defence and government that would have enabled him otherwise to effect his responsibilities as commander-in-chief of both army and navy and head of the military authorities adequately. He had many complaints. The fact that the government did not proclaim the state of martial law at the outset of the mobilization, and other issues such as his guidelines to the press, the establishment of mobilization clubs on a social-democratic basis, which met with violent opposition from Reynders, and opposing views with respect to military policy, all had a detrimental effect on the relationship between Reynders and the government, to the extent that the commander-in-chief was dismissed on February 6 1940.

The central issue is that the differing professional viewpoints of the government - i.e. Minister of Defence - and the commander-in-chief would not have developed the way they did and personal feelings would not have escalated, if the constitutional relationship between civil and military authorities in extraordinary legal situations had been laid down in a balanced way in a modern War Law, with a proper constitutional delineation of the position of commander-in-chief as a necessary proviso. Proof of the appropriateness of this statement is that the government tried to create a new War Law in the second half of 1939 and first half of 1940, an attempt that was not supported by Minister Dijkhoorn. His attitude was justified, as is apparent from the negative advice of the Council of State, which body stated that the intended revision of the War Law was at odds with the Constitution and that the time was unsuited for an alteration of the Law since war was on hand.

Even when the personal relationship between the Minister of Defence and the commander-in-chief would have been less tense, both of them would have encountered hardly surmountable difficulty in the execution of their tasks because of the lack of constitutional regulations. Both of them, with individual viewpoints and responsibilities, served their country to the best of their abilities. Their hope was that the improper constitutional situation that arose at the beginning of the mobilization, could be rectified. The gentlemen's agreement of 1939 can be characterized as an emergency act which was disliked by both parties and which called for too much improvisation.

The De Geer government was forced to improvise since it did not want nor dare to give too much power to the military authorities, because it was convinced that certain interests could best be taken care of by civil bodies. The Minister of Defence was also in a difficult position because he did not succeed in convincing the government of the necessity to proclaim the state of martial law in the entire country, which resulted in him being unable to fulfill his promise to the commander-in-chief. General Reynders was unhappy and disappointed because - being the commander-in-chief of the armed forces and head of the military authorities - he felt hindered in the execution of his tasks.

The main cause of this tragedy - a rightful characterization - was that all bodies involved were, in a constitutional sense, up against the wall at the beginning of the mobilization in August 1939 because of the failure of the various governments during the interbellum period to revise the dated War Law or substitute it with a modernised version. The government, i.e. the Minister of Defence, and the commander-in-chief, as highest ranking military officer, were blamed. For this reason, all parties involved are entitled to sympathy, whereas criticism of all authorities responsible on the eve of World War II ought to be mild.